IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933.

A. MAGNANO COMPANY, a corporation, Appellant,

v.

G. W. HAMILTON, as Attorney General of the State of Washington, WALTER J. ROBINSON, as Director of Agriculture of the State of Washington, and CLARENCE D. MARTIN, as Governor of the State of Washington, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

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Attorney General of the State of Washington.

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

Chapter 23, Laws of Washington for 1931 (hereinafter referred to as chapter 23) placed an excise tax of fifteen cents a pound on all butter substitutes sold within the state not for export. (R. 10.) It was before the Supreme Court of the State of Washington in *State ex rel. Reiter v. Hinkle*, 161 Wash. 652.

From March 9, 1931, the effective date of chapter 23, Laws of Washington for that year, until September 13, 1932, the date of the trial below, appellant made no attempt whatever to sell oleomargarine or "Nucoa" (R. 38).

The sole reason given was that if the tax were added to the import price existing between those dates, they would have had to ask a price which would be higher than the price of butter as it was between those dates (R. 37).

No evidence was offered whatever to show the production cost of oleomargarine or that the arbitrarily fixed import price could not be profitably lowered. Objection was made to an offer of proof that the production cost of oleomargarine was only 6c a pound (R. 40).

This case was tried on September 13, 1932 (R. 36). The opinion below (2 Fed. Supp. 417) was filed on January 17, 1933.

The Findings of Fact, Conclusions of Law and Judgment, however, were not filed by appellant until August 29, 1933 (R. 55).

Of course the findings made by the court were based on the evidence as of September 13, 1932, and it will not be disputed that since that date (September 13, 1932) oleomargarine or Nucoa has been sold in the state of Washington in interstate commerce and the federal tax thereon paid.

The act complained of expressly provides (section 10) that sales for export from the state are not taxable (R. 13) and section 13 thereof is as follows (R. 14):

"Sec. 13. Nothing in this act contained shall be construed to require the payment of the excise tax herein provided for, or the doing of any acts which would constitute an unlawful burden upon the sale or distribution of butter substitutes as herein defined, in violation of the constitution or laws of the United States."

It was pointed out in both opinions below that interstate commerce was not affected except incidentally. Said Judge Neterer in his opinion (R. 52):

"The state excise tax does not burden plaintiff's business, if delivered from the plant direct to the consumer * * *."

In his concurring opinion below, Judge Cushman said (R. 54-5):

"The act clearly shows that it was not intended to forbid interstate sales of oleomargarine. No showing has been made as to whether complainant's interstate sales have increased since the law became effective and to what extent. With the law taxing intrastate sales and leaving interstate sales untaxed it is quite possible that the law has benefited rather than injured the complainant insofar as its customers are of the description particularly pointed out above."

ARGUMENT

Appellant would have this court hold that the tax is confiscatory and for the sole purpose of burdening the oleomargarine business in aid of the dairy industry.

I.

The Court Will Not Inquire Into the Motives of the Legislature in Enacting a Law.

In the case of *Southwestern Oil Co. v. Texas*, 217 U. S. 114, at page 126, in sustaining an occupation tax upon wholesale dealers in oil, the supreme court said:

"* * * What were the special reasons or motives inducing the state to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the state was to encourage retail dealing in the particular articles mentioned in section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax Cases*, 18 Wall. 206, 231, that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' But we will not speculate as to the motives of the State, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. * * *"

In *United States v. Des Moines & Company*, 142 U. S. 510, the court said, at page 544:

"* * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith. * * *."

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, at page 151, the court said:

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of congress. (Citing cases.) Nor may the court enquire into the wisdom of the legislation. * * *."

In the case of *Arizona v. California*, 283 U. S. 423 (the *Boulder Canyon* case), at page 455, Mr. Justice Brandeis writing the opinion of the court, said:

"Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not enquire. * * *."

And in an appended note at the bottom of the same page he says:

"Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers. * * *."

Realizing this rule appellant argues that the excessive rate of the tax in question in practical operation and effect destroys its business and points to the fact that since the effective date of the tax in question (March 9, 1931) and the 13th day of September, 1932, no taxable sales of oleomargarine had been made within the state.

Appellant therefore contends that while this act is nominally a taxing measure in truth and in fact it seeks to prohibit the oleomargarine business, something which could not be accomplished directly under the police power.

There are many answers to this contention.

In the first place it cannot be admitted that a prohibition of sales of oleomargarine would be unconstitutional.

In *Powell v. Pennsylvania*, 127 U. S. 678, the validity of an act of Pennsylvania prohibiting the manufacture and sale of oleomargarine within the state was sustained.

Appellant argues, however, that *Powell v. Pennsylvania*, 127 U. S. 678, is over-ruled by *Schollenberger v. Pennsylvania*, 171 U. S., page 1, and *Collins v. New Hampshire*, 171 U. S., page 30, both of which cases involved the sale in original packages of oleomargarine brought into the state in interstate commerce. The court held that the acts prohibiting or burdening original package sales offended against the commerce clause and were therefore not valid.

The court in the *Schollenberger* case simply distinguished the *Powell* case but did not over-rule it. In *Schollenberger v. Pennsylvania*, 171 U. S., at page 15, the court said:

"The *Powell* case did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing,

and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument."

After the decision in the *Schollenberger* case, 171 U. S. 1, the congress enacted the act of 1902 (32 Stat. 193; 21 U. S. C. A., section 25) declaring that the police power of the states should extend to oleomargarine notwithstanding sales were made in original packages. We quote the act:

"'All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'"

Even in the absence of this statute the *Schollenberger* case would no longer be controlling for in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, the court definitely repudiated the original package doctrine as applied to commerce between states.

In *Hammond Packing Company v. Montana*, 233 U. S. 331, in sustaining a tax of 4c a pound upon sales of oleomargarine the court said; at page 333:

"* * * Apart from interference with commerce among the states, a State may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 246. It even may forbid the manufacture altogether. *Powell v. Pennsylvania*, 127 U. S. 678. It may express and carry out its policy as well in a revenue as in a police law. *Quong Wing v. Kirkendall*, 223 U. S. 59, 62. * * *."

Appellant argues that *Weaver v. Palmer Brothers Co.*, 270 U. S. 402, over-rules the *Powell* case but in that case the court very pointedly said (page 414): "The facts clearly distinguish this case from the *Powell* case."

Appellant makes quite an elaborate argument, however, on certain cases from state courts dealing with statutes prohibiting the sale of oleomargarine. We will later show that the decisions of our state courts are so divided as to be of no assistance. Nor do we need to look to these cases for assistance in view of the well considered cases in the Federal courts.

It is submitted that the case of *Powell v. Pennsylvania*, 127 U. S. 678, has not been over-ruled and

that on its authority the tax involved in this case would be sustained even if it amounted to a prohibition of intrastate sales of oleomargarine.

Fisher Flouring Mills v. Brown, 109 Wash. 692-697.

CHAPTER 23 OF WASHINGTON LAWS OF 1931 IS NOT CONFISCATORY AND DOES NOT DESTROY THE OLEOMARGARINE BUSINESS.

But if we assume for purposes of argument that the sale of oleomargarine cannot validly be prohibited there is nothing to show that the act is prohibitory in character unless it be that up to the date of the trial below no sales of oleomargarine had been made. This is not sufficient. The record shows that appellant had not tried to sell any oleomargarine in the state of Washington since the act was passed (R. 38). Is it reasonable to suppose that appellant would attempt any taxable sales pending the final outcome of this litigation when any such attempt would mean the undermining of its case?

In its second assignment of error appellant states "The sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the state of Washington of oleomargarine in aid of the dairy industry, a purely private business."

We have already shown and it must be conceded that this is a revenue act and that the courts will not look into the motives of the legislature in passing the law.

The act does not prohibit the manufacture of

oleomargarine. That must be admitted. The tax is placed on the "distributor" (section 2, R. 11), or as found by the court below on the "dealer" (R. 44).

Butter substitutes moving in interstate commerce are not taxable. The court below found that the tax was operative only when the interstate commerce relation to the oleomargarine was ended (R. 44).

Butter substitutes when sold within the state for exportation are not taxable (R. 13), and it is pointed out in the opinion of Judge Cushman (R. 54) that since the law taxed intrastate sales and left interstate sales untaxed, it benefited the importing part of appellant's business.

If appellant has refused to avail itself of its right to import butter substitutes in interstate commerce without payment of this tax, others engaged in the same business have not been so lax.

How can it be contended that the entire business is destroyed by an act which simply taxes intrastate sales; not for export; and if imported then only such intrastate sales as have lost their relation to interstate commerce?

Appellant rests its case upon the relative prices of oleomargarine and butter, without regard to the cost of production, and argues that with the prices of these two commodities the same as they were at the date of the trial below it was impossible for oleomargarine to compete with butter if the tax were paid.

Should the price of butter rise or the price of oleomargarine fall to a point where the tax on oleomargarine could be paid with profit, appellant would, if logical, concede the constitutionality of the tax.

The court will not rest the constitutionality of this act upon the upward or downward movement of the price of butter or butter substitutes.

APPELLANT'S REAL CLAIM IS THAT THE TAX DISCRIMINATES BETWEEN BUTTER AND OLEOMARGARINE.

It is apparent that in alleging the prohibitory character of the tax involved in this case, appellant is not relying on the claim of excessiveness so much as the fact that butter is not subject to a similar tax.

For if we were to assume that the legislature levied a tax of fifteen cents a pound on both butter and butter substitutes, there could be no claim of confiscation and this case would not be here. The case is premised on the fact that another product is not similarly taxed.

Yet counsel for appellant concede that there is a basis for classifying oleomargarine separately from butter (R. 40) and the courts have sustained such a classification.

Hammond Packing Co. v. Montana, 233 U. S. 331.

Appellant, however, attempts to treat the question of alleged excessiveness separate from the question of discrimination and argues that this tax is

fixed at such an unreasonable amount as by its very terms to indicate an intent on the part of the legislature to suppress the oleomargarine industry.

A TAXING ACT CANNOT BE CONSTRUED AS CONFISCATORY MERELY BECAUSE OF ITS AMOUNT.

Conceding for the purpose of argument, that a prohibitive tax might be invalidated by the courts, it does not follow that the act involved in this case falls in that category merely because the tax is fixed at 15c a pound.

In *Williams v. Fears*, 179 U. S. 270, the court sustained a tax of $500.00 a year upon emigrant agents. The court said in the course of its opinion (p. 275):

"The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject."

In the case of *Sperry & Hutchinson v. Blue*, 202 Fed. 82, the circuit court of appeals for the fourth circuit upheld a tax on all persons engaged in the trading stamp business of $500.00 for each county in which said business was carried on. It was contended in that case as it was here that this tax was prohibitive. During the course of the opinion it said (p. 88):

"But there is still another difficulty in the way of holding this tax invalid. Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is

so large that it could not reasonably have been intended to produce revenue? * * *."

In the Washington case of *Stull v. De Mattos*, 23 Wash., page 71, a tax of $25.00 a day imposed upon auctioneers was sustained. The court said at page 79:

"* * * All presumptions and intendments are in favor of the validity of the tax. * * * In other words, the mere amount of the tax does not prove its invalidity. To determine the amount of revenue required by the needs of the municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion. * * *."

From the earliest times the United States supreme court has held that the judiciary is without power to invalidate a tax, which is otherwise without objections, because of its amount, even though it may possibly be so high as to be prohibitive:

McCulloch v. Maryland, 4 Wheat. 316;
Providence Bank v. Billings, 4 Peters 514;
Weston v. Charleston, 2 Peters 449;
Austin v. Boston, 7 Wall. 694;
Union Pacific v. Peniston, 18 Wall. 5;
Veazie Bank v. Fenno, 8 Wall. 533;
Kirkland v. Hotchkiss, 10 Otto 491.

In *Spencer v. Merchant*, 125 U. S. 345, the question involved was the claimed excessiveness of certain special assessments. During the course of the opinion the court said (p. 355):

"* * * The power to tax belongs exclusively to the legislative branch of the government. *United*

States v. New Orleans, 98 U. S. 381, 392; *Meriwether v. Garrett,* 102 U. S. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' (Citing cases listed above) * * *."

The case of *McCray v. United States,* 195 U. S. 27, involved the constiutionality of the Federal tax of ten cents a pound upon colored oleomargarine. Regarding the claim that the tax was so large as to be prohibitory, Chief Justice White said (page 54):

"It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

Shortly thereafter in *Kehrer v. Stewart,* 197 U. S. 60, the court had before it an occupation tax

upon meat dealers and, as against the same contention, said (p. 70):

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

In *Patton v. Brady,* 184 U. S. 608, involving a Federal tobacco tax, the court said (p. 623):

"It is not the province of the judiciary to inquire whether the exercise *is reasonable in amount,* or in respect to the property to which it is applied. *These are matters in respect to which the legislative determination is final.*" (Italics ours.)

Despite all the foregoing authority, which is all one way, a final attempt was made in the case of *Flint v. Stone Tracy Co.,* 220 U. S. 107, to have the court uphold the contention then made that because of the effect of the exercise of the power to tax, the power should be denied. Mr. Justice Day, speaking for the court (p. 168), said:

"It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch v. Maryland,* that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress."

The court reviewed the authorities above mentioned, and then said:

"The argument at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the representatives, and not in the exertion of unwarranted powers by courts of justice."

Nor can the rule be said to have been modified in any of the late cases by the United States supreme court. Indeed, in one very late case the court seems to have gone to extreme lengths in sustaining a tax claimed to be confiscatory. We refer to *Alaska Fish Co. v. Smith*, 255 U. S. 44, wherein the court had under consideration an act of the Territory of Alaska levying an excise tax of $2 a barrel or ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. Said the court:

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business * * *. Even if the tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk." *McCray v. United States* (citing cases).

The *Child Labor Tax* case, 259 U. S. 20, is both interesting and enlightening. It will be recalled that the court in *Hammer v. Dagenhart*, 247 U. S. 251, had invalidated an act of Congress forbidding transportation in interstate commerce of articles manufactured by the employment of child labor. This, the court said, was an attempt by Congress through the medium of the commerce clause to invade the police

power of the states reserved to them by the tenth amendment. Thereafter Congress enacted a law purporting to tax manufacturers employing child labor 10 per cent of their entire annual net profits. It was attempted to be sustained on the strength of the rule laid down in the cases we have cited. The court, however, refused to consider the imposition a tax but held it to be a penalty and accordingly void on the same ground as the prior act involved in the *Dagenhart* case. It said (p. 36):

"We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. *If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax.* (Italics ours.) But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. * * *"

Continuing, the court said (p. 38):

"* * * Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them *and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.* But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere pen-

alty with the characteristics of regulation and punishment. Such is the case in the law before us."

At page 41, discussing and distinguishing *Veazie Bank v. Fenno,* 8 Wall. 533, the court said:

"It will be observed that the sole objection to the tax there *was its excessive character.* Nothing else appeared on the face of the act." (Italics ours.)

On the authority of this case, we submit that the language of chapter 23, given its ordinary meaning, shows that the legislature levied an excise tax pure and simple and that nothing sinister or ulterior can be deduced therefrom, but that even if the legislature had in mind the incidental motive of discouraging the use of butter substitutes and encouraging the use of butter that would not serve to change the imposition from a tax to something else.

CASES CITED BY APPELLANT FROM OTHER STATES ARE NOT HARMONIOUS AND DO NOT SUSTAIN APPELLANT'S CONTENTION.

Notwithstanding the uniform holding of the supreme court of the United States and the decision of the supreme court of Washington, appellant cites and relies on certain decisions of the courts of other states.

A few of these decisions which are repeated again and again in appellant's brief will be noticed.

Jelke v. Emery, 193 Wis. 311, 53 A. L. R. 463. This case involved an act which made it a crime to either manufacture, sell or solicit orders for oleomar-

garine and therefore differs entirely from the taxing act here under consideration.

As the court below pointed out, the act in the case at bar does not prohibit the business under penalty as *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (R. 44).

The decisions of the state courts are in hopeless confusion as will be seen by reference to the note following *Jelke v. Emery* in 53 A. L. R. at page 474. We consider it unnecessary to cite the many cases referred to in that note which oppose the holding in the reported case and sustain the position of appellees in this case.

Neither are *People v. Arensberg*, 105 N. Y. 123, nor *People v. Marx*, 99 N. Y. 377, in point here. In the first case a criminal statute was held to be constitutional. In the second case the act making it a criminal offense to sell an article intended as a butter substitute was held unconstitutional. Although neither of these decisions are apposite they are repeatedly cited and referred to in appellant's brief.

Neither is *Ex Parte Bock*, 125 Cal. App. 375, cited by appellant in point. This was clearly pointed out in the decision below (R. 44). A municipal ordinance does not bear the same status as to judicial review as a state statute.

Roach v. Ephren, 90 So. 609;
State v. Wilson, 168 Pac. 679.

Notwithstanding, appellant quotes and relies upon Cooley, Taxation (2d ed.), page 599, referring

to municipal governments, and *In re Quong Woo,* 13 Fed. 229, in which an ordinance was involved.

It is submitted that the well considered decisions in the later cases from the Federal courts, ignored by appellant, are deserving of consideration.

In *Best Foods v. Welch*, 34 Fed. (2d) 682, the statutory three judge court considered a statute of the state of Idaho imposing an excise of $200.00 a year on wholesale dealers and $50.00 a year on retail dealers in oleomargarine. The same objections that are now urged in the case at bar were urged in that case. The same authorities relied upon by appellant in this case were cited, construed and distinguished by the court in a very able opinion in that case.

The court, in *Best Foods v. Welch*, 34 Fed. (2d), at page 686, said:

"The act in issue exacts a definite license fee. It is significant that this money is placed in the general fund of the state and appears in the relation of a taxation measure, and as such may be sustained, and if for revenue the court cannot consider the reasonableness of the amount. Cooley on Taxation, vol. 1, sec. 29. The exercise of acknowledged power to tax may not be scrutinized by the court. The responsibility rests upon the legislature, and if unreasonably exercised redress rests with the people. *Spencer v. Merchant*, 125 U. S. 355, 8 S. Ct. 921, 31 L. Ed. 763. * * *."

Continuing, the court pointed out the difference between cases cited by appellant where a regulatory tax is involved and the case at bar in the following words:

"The distinction between a regulatory tax and one solely for revenue is that the regulatory tax must bear reasonable relation to the cost of such regulation (citing cases). But if imposed under the general taxing power, the amount rests wholly within the discretionary power of the taxing authority. * * *"

After the decision in *Best Foods v. Welch* the case of *Kelly v. Allen* came before the statutory court, consisting of circuit judges, Wilbur and Sawtelle and District Judge Neterer. In this case the state's authority to tax was squarely presented (p. 877). The decision is reported in 49 Fed. (2d) at page 876. On page 877 the court used this language:

"The power of the state to tax is unlimited (*Austin v. Aldermen of Boston*, 7 Wall. [74 U. S.] 694, 19 L. Ed. 224); it is the essential of political existence, and the essence of the prosperity of the state (*Nicol v. Ames*, 173 U. S. 509, 515, 19 S. Ct. 522, 43 L. Ed. 786). * * *"

Appellant Attempts to Distinguish the Cases In Point.

Counsel for appellant ignore *Best Foods v. Welch*, 34 Fed. (2d) 682; a case in which all the questions here raised were disposed of, but make an attempt to distinguish certain other cases which it is realized must be given consideration.

First, they choose to refer to the reasoning of Mr. Justice Holmes in *Hammond Packing Co. v. Montana*, 233 U. S. 331, as *dictum*. But, Justice Holmes in writing this opinion based his holding on *Powell v. Pennsylvania*, 127 U. S. 678, in which case

the court did hold that a state could prohibit the manufacture of butter substitutes altogether.

How can counsel argue that *Powell v. Pennsylvania* is overruled?

Nor is the holding in *Powell v. Pennsylvania* out of harmony with such cases as *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros.*, 270 U. S. 402. Those cases are distinguished in the very opinions themselves. They involve regulatory measures.

In the *Weaver* case the act prohibited under penalty the use of shoddy in the manufacturing of mattresses. The court said (270 U. S. 415):

"The business here involved is legitimate and useful and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."

Moreover, the arbitrary nature of the act was affirmatively established by proof of matters not appearing on the face of the act.

In the case at bar the tax is imposed under the general taxing power of the state and the attack is based solely on the amount of the tax. That is a matter which rests wholly in the discretion of the legislature whereas a regulatory tax, such as involved in *Weaver v. Palmer Bros.* and other cases relied on by appellant, must bear a reasonable relation to the cost of such regulation.

Best Foods v. Welch, 34 Fed. (2d) 682.

Does appellant argue that this court will invade the province of the legislature and say when a tax is reasonable in amount simply because the court has the power and duty to determine the reasonableness of an act regulating the manner of conducting a business such as was involved in the *Adams* case (244 U. S. 590), or the *Weaver case* (270 U. S. 402)?

If so, the argument is answered in *McCray v. United States*, 195 U. S., at page 61, where the court after reviewing the authorities said:

"The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."

Reference to the abstract of arguments in the *McCray* case, to be found in 195 U. S., at p. 32, will show that the same points were raised in that case against a tax of ten cents a pound on oleomargarine which are sought to be raised here.

It was there argued that "the tax is so large that it is evident that it was imposed, not as an excise for revenue, but as a prohibition."

This argument was repulsed, the court saying squarely that the question was settled by the authorities.

This case cannot be ignored or distinguished by counsel. It is not only sound on authority, but sound on principle and reason. How can a court say that a tax of ten cents a pound is constitutional but a tax of twenty is not?

Can the court say a tax of $2.00 a barrel on fish is constitutional (*Alaska Fish Co. v. Smith*, 255 U. S. 44) but a tax of $2.50 is unconstitutional?

Can the same court which refused to inquire into the motives of the legislature in passing a tax of twenty-five dollars a day on auctioneers (*Stull v. De Mattos*, 23 Wash. 71) be expected to inquire into those motives if the tax levied were thirty or forty dollars a day?

Consider the result if the claimed excessiveness of the tax could be proven, as was attempted in the case at bar by the comparative market prices of competing articles of merchandise.

The market price of butter might rise or the price of butter substitutes fall, so that one day a tax on butter substitutes would be constitutional and the next day unconstitutional.

In the nature of things the legislature will adjust the taxes. The courts cannot. It must be presumed that butter is properly taxed and will remain so.

The taxing power is a legislative power, and as was said in the *Minnesota Rate* cases, 230 U. S. 352, with relation to the rate-making power, the court will not substitute its judgment for that of the legislature as to matters within the province of the legislature.

Counsel can not avoid the effect of *Alaska Fish Co. v. Smith*, 255 U. S. 44, by quoting the following sentence at the bottom of page 48:

"We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us."

For the court did have before it a case exactly like the one at bar. That is, the claimed excessiveness of the amount, *without proof that the legislature transcended or exceeded its acknowledged power to tax,* was relied upon.

When the constituted authority of the state undertakes to exert the taxing power, and the validity of its action is brought before the Federal supreme court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

Green v. Frazier, 253 U. S. 233.

The opinions in *Alaska Fish Co. v. Smith,* 255 U. S. 44, *McCray v. United States,* 195 U. S. 27, and *Best Foods v. Welch,* 34 Fed. (2d) 682, answer every contention made by appellant in this case.

We therefore submit that there is nothing in this case from which this court can judicially determine that the tax imposed by chapter 23 is so excessive in amount as to be prohibitive and that even if it could be so determined, the tax, under the controlling authorities, must be sustained.

II.

Chapter 23 Is Not a Tax for a Private Purpose.

In the case of *State ex rel. Reiter v. Hinkle,* 161 Wash. 652, the supreme court of the state of Washington decided that the tax involved in this case was necessary for the support of the state government and its existing public institutions. The question is no longer an open one. That the holding of the Washington supreme court was correct will be at once seen from an inspection of the act.

Section 5 of the act (R. 12) provides that the revenues from the tax shall be paid "into the general fund of the state of Washington." It is therefore for a *public purpose* and valid.

Appellant quotes but one case of a private tax, *Loan Assn. v. Topeka,* 20 Wall. 655. In that case a tax was imposed to pay bonds theretofore issued in aid of private manufacturing plants, which by that means had been induced to locate in the city.

The difference between the tax involved in that case and this public revenue measure is at once apparent. None of the revenue to be derived from this act is to be used for any other than a public purpose. Certainly the dairymen get no part of it.

But appellant attempts to argue that this is a private tax in aid of the dairy industry because it destroys the competing oleomargarine industry.

We have already shown that the oleomargarine

industry has not been destroyed and that the tax is not confiscatory.

Once again it must be pointed out that this is an assault on the motives of the legislature. The point attempted to be made is completely answered by the *cases already cited to the effect* that the court will indulge every presumption in favor of the integrity of the tax, rather than question the motives of the legislature.

The court finding this to be a revenue meaure cannot hold it unconstitutional simply because the tax is large.

Counsel realizing the truth of this and being unable to find any authority to the contrary (except cases involving regulatory measures) attempt to find something else, as they say, on the very face of chapter 23.

On page 45 of appellant's brief we find the following statement:

"The tax is applied when and only when oleomargarine is sold or used as a substitute for butter."

We do not think counsel mean to imply that oleomargarine is used for any purpose other than a butter substitute, for the statement is made in an attempt to argue that because the legislature classified butter substitutes separately from butter for purposes of taxation, they adopted that classification in aid of the butter industry.

Counsel can not seriously contend that the separate classification of butter and butter substitutes

is invalid. If this is a proper classification, how can it be said that by adopting it the legislature did anything wrong? How can it be said that the legislature intended either to suppress the oleomargarine business or to aid the butter industry?

That a classification of butter and oleomargarine for taxing purposes is valid cannot be doubted.

Hammond Packing Co. v. Montana, 233 U. S. 331;
Quong Wing v. Kirkendall, 223 U. S. 59;
Heisler v. Thomas Colliery Co., 260 U. S. 245;
McCray v. U. S., 195 U. S. 27;
Alaska Fish Co. v. Smith, 255 U. S. 44;
Best Foods v. Welch, 34 Fed. (2nd) 682.

The *Montana* case has already been adverted to. Said the court:

"The argument for the plaintiff in error is that, the tax being pronounced or assumed by the state courts to be a tax for revenue, it is unjustifiable to put oleomargarine in a class by itself and to discriminate, for instance, between it and butter. But we see no obstacle to doing so in the constitution of the United States. * * *."

In the *Kirkendall* case a tax was levied upon hand laundries and not upon steam laundries. Sustaining the tax, the court said:

"It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary. * * *. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

The *Heisler* case involved a tax upon anthracite coal which was not imposed upon bituminous coal.

This was asserted to be a wholly arbitrary classification. Mr. Justice McKenna held that "any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is enough if the classification is reasonably founded in the purposes and policy of taxation;" further that "the purpose of the legislation may not be the correction of some definite evil but may only be to remove *obstacles to a greater public welfare.*" It was argued, however, that bituminous and anthracite coal came into direct competition with each other. To this, Justice McKenna said:

"The fact of competition may be accepted. Both coals, being compositions of carbon, are, of course, capable of combustion, and may be used as fuels, but under different conditions and manifestations, and the difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated, and the extent of their use. *They are, therefore, incentives to industries that the state, in natural policy might well hesitate to obstruct or burden;* and to yield to the policy or consider it is well within the concession of the power of the state, expressed in the cases we have cited. The distinction in the treatment of the respective coals being within the power

conceded by the cases to the state, it has logical and legal justification, and is, necessarily, not unreasonable or arbitrary."

The application of this statement to the classification made in the case at bar is direct. Dairying is a primary industry of the state, contributing to the welfare and prosperity of thousands of its citizens. In the production of butter there are involved many valuable by-products which "are incentives to industries that the state in its natural policy might hesitate to obstruct."

As a matter of fact the reasons prompting the classification, if material, are not hard to understand. They are adverted to in the opinion below and facts justifying this classification cannot be distorted into an argument that the purpose of the legislature was to aid a private industry.

We quote from *Best Foods v. Welch*, 34 Fed. (2d), at page 686:

"This court has no interest in the policy of the state revenue laws, so long as equal protection is not denied, and is reasonable and not purely arbitrary. Nor is the Fourteenth Amendment concerned with state legislation where there is a real difference and it will not create an artificial equality. *Quong Wing v. Kirkendall*, 223 U. S. 59, 32 S. Ct. 192, 193, 56 L. Ed. 350. There is no equality between the cow on the farm and her natural product, 'butter,' and the manufacturing plant at San Francisco, Salt Lake, or elsewhere, and its artificial product, 'Oleomargarine.' Each product has food value, but composed of different elements, and the difference determines between them as food, and is a just basis for classification. * * *."

In *Alaska Fish Co. v. Smith*, 255 U. S. 44, the contention was urged that the tax on manufacturers of fish oil, fertilizer and fish meal out of herring unconstitutionally discriminated between manufacturers utilizing herring for those purposes and those utilizing other kinds of fish. Mr. Justice Holmes said:

"We are content, however, to assume for the purposes of decision that, not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a constitution that has known protective tariffs for a hundred years."

A General Revenue Measure Is Not a Tax for a Private Purpose Simply Because Based on a Proper Classification.

There can be no doubt that this is the rule even though the tax on one industry may appear to aid a competing industry.

Nicol v. Ames, 173 U. S. 515;
Ohio Oil Co. v. Conway, 281 U. S. 146;
Bell's Gap Ry. v. Pennsylvania, 134 U. S. 232.

In the case last cited, the court said (134 U. S., at page 237):

"* * * We think that we are safe in saying, that the Fourteenth Amendment was not intended to

compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; *which are necessary for the encouragement of needed and useful industries*, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

If the classification rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law. As an example of the extent to which the court has gone in sustaining tax classifications we point to the recent chain store tax case: *State Board v. Jackson*, 283 U. S. 527.

In that case on page 537 the court said (75 Law Ed. 1256):

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

Counsel in arguing this assignment of error again attack the motives of the legislature and argue that the tax is prohibitory, basing their assumption on the retail prices of butter substitutes at the time of the act.

The whole case for appellant is summed up in the paragraph which we quote from, page 46 of appellant's brief:

"Not only so, but it is apparent that the members of the legislature knew when they passed the act that the tax would be prohibitory. At that time the difference in the retail price of butter and oleomargarine was from 10c to 12c. Nevertheless, a tax of 15c a pound was imposed on the sale of oleomargarine. The members of the legislature, therefore, knew that at that time such a tax would not produce a dollar of revenue and would prohibit the sale of oleomargarine."

It is apparent from this quotation that the retail prices fluctuate. In the absence of proof to the contrary the court must presume that the legislature had determined that this tax would not necessarily raise the price of butter substitutes above that of butter and that butter itself had been or would be properly taxed.

If appellant's argument is sound, the dairy farmer could avail himself of it the next time he is taxed unless the distributor of oleomargarine is similarly taxed, and the undoubted power of the legislature to classify oleomargarine and butter separately for purposes of taxation would be denied.

III.

Chapter 23 Does Not Constitute an Unlawful Interference With the Federal Taxing Power.

In arguing assignment of error No. 4, appellant assumes that the oleomargarine industry is destroyed by the tax. Of course, the manufacture of oleomargarine is not taxed by this act so that the Federal government receives the tax levied upon manufacturers.

Sales for export to other states are expressly not taxed and therefore the Federal government receives its tax from such sales.

The Federal government received its tax from oleomargarine shipped into the state either through agents or by order and it cannot be denied that many thousands of pounds of oleomargarine are being consumed in the state, notwithstanding the fact that no taxable sales were made prior to the trial of this case under chapter 23.

The Federal government receives its tax on all of this bufter substitute so used in the state and so shipped out of the state.

The Federal taxing power is therefore not interfered with. But we do not admit that the tax on sales for local consumption is prohibitive. That cannot be determined from the market price alone. Appellant's whole case is based on the market price at a certain time.

That being the only evidence to support the claim of confiscation, the court must sustain the act as a valid exercise of the state's taxing power.

In the exercise of its police power the state of Washington could have excluded or taxed oleomargarine even in the original package. This power was granted it by congress by the act of 1902 (Title 21 U. S. C. A. Sec. 25), and it has been held that a state may combine a tax and a police measure in one act without violating any constitutional rights.

Gundling v. Chicago, 177 U. S. 183.

But, the question has been definitely set at rest by the decision in *Plumley v. Massachusetts*, 155 U. S. 461; in which the court held that the Federal oleomargarine tax act did not in any way restrict the power of the states.

The Massachusetts' act involved in that case, forbade the manufacture and sale of oleomargarine in imitation of butter. The court said (pp. 465 and 466):

"The learned counsel for the appellant states that Congress in the act of August 2, 1886, has legislated fully on the subject of oleomargarine. This may be true so far as the purposes of that act are concerned. But there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufactures of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (Sec. 3) that sections 3232 to 3241 inclusive and section 3243 of the Revised Statutes, Title Internal Revenue, 'are, so far as applicable, made to extend to and include and apply to the special taxes' so imposed, 'and to the persons upon whom they are imposed.' Section 3243 of the Revised Statutes is in these words: 'The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be

held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.' It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. *License Tax Cases,* 5 Wall. 462, 474; *Pervear v. Commonwealth,* 5 Wall. 475; *United States v. Dewitt,* 9 Wall. 41."

Counsel for appellant attempt to argue that Congress intended only to allow a *reasonable tax* by the states. But it is submitted that Congress simply wished to make sure that the sovereign state's right to tax, so necessary for its existence, should not be abridged in any way. Section 3243 of the Revised Statutes, therefore provided, among other things, that the payment of the Federal tax on oleomargarine should not prohibit any state from placing "a duty or tax on the same trade or business for trade or other purposes."

Counsel can not read into this act or any other act a limitation on the taxing power that a tax must be reasonable in amount. Who is to be the judge of the reason-

ableness of the amount? Certainly not the tax payer. The legislature and the legislature alone has the power to levy, revise or forgive taxes.

In *Knowlton v. Moore*, 178 U. S. 41, at p. 60 the court said:

"* * * Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. * * *"

Both the national and state jurisdictions may act in their respective spheres, each unlimited by the other.

License Tax cases, 5 Wall. 462;
Snyder v. Bettman, 190 U. S. 249.

This is not a question of when either jurisdiction may tax property of the other such as was involved in *South Carolina v. U. S.*, 199 U. S. 437, or *Van Brocklin v. Tennessee*, 117 U. S. 151, cited by appellant.

Nor can appellant derive any comfort from the reasoning in *Minnesota v. Barber*, 136 U. S. 313, in which case the act involved directly excluded all beef, etc., taken from animals slaughtered in other states, a discrimination in favor of *like products and business of Minnesota.*

IV.

Chapter 23 Does Not Violate the Commerce Clause of the Federal Constitution.

The tax in this case by its very terms does not attach until interstate transportation is ended. Even if the tax attached to sales in original packages, it would not violate the Federal commerce clause (Title 21 U. S. C. A., Sec. 25).

Sonneborn Bros. v. Cureton, 262 U. S. 506.

In the last named case the court had before it an occupation tax levied upon persons engaged in the importing of and sale in original packages of oil in the state of Texas. We quote from the decision, pages 508 and 509:

"* * * Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

There can be no question but that this is the rule, and appellant is forced to rely on cases such as *Gramb-ling v. Maxwell*, 52 Fed. (2d) 256, in an attempt to argue that the Washington tax violates the commerce clause.

In that case a North Carolina statute by its very terms applied to peddlers of fruit who did not maintain

a permanent place of business in the state. It exempted from the tax peddlers of fruit who did maintain a permanent place of business in the state.

It can not be denied, of course, that such a tax would be unconstitutional, but the court recognized that a tax such as that involved in the case at bar wherein there is no discrimination would be constitutional.

We quote from page 258 the language immediately preceding the quotation set forth on page 67 of appellant's brief:

"On the first question, the constitutionality of the tax, it is of course well settled that a state may impose a tax on those carrying on the business of peddlers, even though the goods sold may have been brought into the state in interstate commerce, so long as there is no discrimination in the tax against the goods of other states." (Citing cases.)

Another case relied upon by appellant in arguing that the Washington tax offends against the commerce clause is *Minnesota v. Barber*, 136 U. S. 313. That case involved a statute of the state of Minnesota which by its necessary operation practically excluded all meat taken from animals slaughtered in other states. It was directly designed to prevent the introduction into the state of meats from animals slaughtered elsewhere.

Whereas, in the case at bar the act applies the tax indiscriminately to all butter substitutes sold in the state, regardless of the place of manufacture. It does not discriminate against oleomargarine manufactured in other states so as to erect a tariff barrier.

Even if there were no butter substitutes manufac-

tured in the state of Washington, the objection urged by appellant would not be well founded.

Wagner v. City of Covington, 251 U. S. 95;
Askren v. Continental Oil Co.; 252 U. S. 444.

In arguing this assignment of error, counsel again refers to *Schollenberger v. Pennsylvania*, 171 U. S. 1, and *Collins v. New Hampshire*, 171 U. S. 30. These cases have been heretofore distinguished and were distinguished by the court below.

Again in arguing this assignment of error, counsel for appellant concede that the tax involved in this case would be valid if reasonable. We have already cited cases to the effect that the legislature is the sole judge of the reasonableness of this tax.

Appellant's whole argument, therefore, is based upon the assumption that this tax is so great as to be prohibitory. While appellant makes four assignments of error and counsel divide their argument into four parts, each part is based upon this assumption: That the tax is prohibitory.

But, chapter 23 on its face and by its necessary application shows that it is not a burden on interstate commerce. Section 10 thereof provides that the tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation (R. 13).

Section 13 of the act (R. 14) expressly provides that no tax shall be collected on sales which are protected by the constitution and laws of the United States. Indeed,

the act does not go as far as it might for it does not tax sales in the original package.

How then can an argument be made that the effect of this act is to destroy or even constitute a real hindrance to interstate commerce? It is submitted that this act instead of being a hindrance to interstate commerce would be a benefit. This was the opinion of Judge Cushman in his separate concurring opinion (R. 55).

That the court was right is shown by the fact which can not be disputed that thousands of pounds of butter substitute are being consumed in the state of Washington, although the sales may not be taxable under chapter 23. These butter substitutes moved in interstate commerce. The Federal tax was paid on each and every pound. Contrary to the inference contained in appellant's brief these interstate sales are not confined to individual shipments by mail order.

The act does not, in fact, either infringe upon the Federal taxing power or contravene the commerce clause.

SUMMARY

All of the points raised by counsel in this case are based upon the market prices of butter and butter substitutes at the time of the act. The case, therefore, differs from *Field Packing Co. v. Glenn*, 5 Fed. Sup. No. 1, page 4, in which evidence was adduced to show the comparative cost of production of oleomargarine and butter; the differential in prices over a period of years (from 1914 to 1931); and in which it was proved that a bona fide attempt was made to sell oleomargarine. All of these facts are wanting in the case at bar. Moreover, as this court pointed out in *Glenn v. Field Packing Co.*, 54 Sup. Ct. Rep., page 138, the supreme court of the state of Kentucky had not passed upon the act.

The supreme court of the state of Washington has passed on the Washington act. Immediately after the passage of chapter 23, certain proper parties sought to file with the secretary of state a referendum petition whereby that chapter would be submitted to the voters of the state.

Inasmuch as chapter 23 contained an emergency clause, the filing of the application was refused and counsel for appellant in this case filed an action in the supreme court of the state of Washington in the nature of mandamus to compel the filing of this petition for referendum. (*State ex rel. Reiter v. Hinkle*, 161 Wash. 652.) The petition was denied, the court holding that the measure was necessary for the support of the state govern-

ment and, therefore, under the emergency clause the petition could not properly be filed.

Under our procedure mandamus is simply an ordinary civil action. The constitutionality of the entire act was properly raised, and the Washington supreme court has held that this act is valid and emergent.

State v. Roberge, 144 Wash. 74;
State v. Vincent, 144 Wash. 246, pp. 250 and 251.

The same argument was presented in the Washington case as is presented in this case.

In conclusion, it is submitted that chapter 23, Laws of Washington for 1931, is constitutional and that the decision of the court below should be sustained.

Respectfully submitted,

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